

No. PD-1044-19

**IN THE
COURT OF CRIMINAL APPEALS OF TEXAS
AT AUSTIN**

FILED
COURT OF CRIMINAL APPEALS
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**THE STATE OF TEXAS,
Petitioner**

v.

**RICKY MORENO,
Respondent**

*From the Court of Appeals for the
Fifth District of Texas at Dallas
In Cause Number 05-18-00271-CR*

STATE'S BRIEF ON THE MERITS

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283rd Judicial District Court
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Petitioner: The State of Texas

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State of Texas respectfully submits this brief on the merits based on this Honorable Court's grant of discretionary review of the opinion of the Fifth Court of Appeals at Dallas.

STATEMENT OF THE CASE

A Dallas County grand jury indicted Ricky Moreno for the offense of aggravated kidnapping. (CR: 32). He pled not guilty, but a Dallas County jury found him guilty of the charged offense. (CR: 120, 128; RR 8: 191). Thereafter, Moreno pled not true to an enhancement paragraph alleging a prior felony conviction. (RR 9: 8). The jury heard punishment evidence, found the enhancement paragraph true, and assessed Moreno's punishment at forty-five years' confinement in the Institutional Division of the Texas Department of Criminal Justice and a \$10,000 fine. (CR: 126, 128; RR 10: 4). Moreno filed a motion for new trial, which the trial court overruled, and a timely notice of appeal. (CR: 10, 131, 164-75). On appeal, the Fifth Court of Appeals at Dallas reversed the decision of the trial court. *See Moreno v. State*, 586 S.W.3d 472, 2019 WL 4071993 (Tex. App.—Dallas 2019, pet. granted). On September 30, 2019, the State filed a petition for discretionary review in this Honorable Court; the petition was granted on November 20, 2019. The State now files this brief on the merits urging reversal of the decision of the court of appeals.

GROUND FOR REVIEW

The trial court excluded evidence of the defendant's particular circumstances as irrelevant to the objective reasonable person standard for duress. Did the court of appeals err in finding an abuse of discretion by the trial court?

STATEMENT OF FACTS

The State charged Ricky Moreno with aggravated kidnapping for his role in the July 1, 2016 kidnapping, torture, and murder of Jonathan Gutierrez. Gutierrez met Avigail Villanueva when she was thirteen years old; they dated for a couple of years and broke up, but they later resumed dating and had five children together. (RR 6: 144). In 2015, Villanueva and Gutierrez ended their relationship. (RR 6: 146).

Villanueva regularly bought and used drugs at Thomas Johnson's garage apartment behind his parent's house, located at 755 Elwayne Avenue in Dallas, Texas. (RR 6: 30-31, 147, 201; RR 7: 68). Villanueva met Martin Armijo at Johnson's apartment, and they dated for five or six months. (RR 6: 148). When they broke up, Armijo told Villanueva to stop texting and calling him. (RR 6: 148). On July 1, 2016, Villanueva wanted to acquire drugs; before going to Johnson's neighborhood, she texted Armijo because he had previously told her that if he saw her in the neighborhood without him, he would beat her. (RR 6: 149-50). Armijo responded, "I got your BD with me." (RR 6: 150). Armijo also called her and said he had Gutierrez with him. (RR 6: 150-51). At first, Villanueva thought the two men

had become friends, but then Armijo said, “I been having him for the past couple hours.” (RR 6: 151). Armijo explained that he had been torturing Gutierrez for “the past couple hours.” (RR 6: 152). Armijo asked Villanueva where she was, and she initially lied about her location. (RR 6: 152). She ultimately said her mother would take her to a gas station near Johnson’s apartment. (RR 6: 155). Villanueva heard Armijo tell Moreno to grab the keys and go pick her up at the gas station. (RR 6: 155).

Moreno arrived alone at the gas station a few minutes later. (RR 6: 155). Villanueva had known Moreno for a few years; she frequently saw him in the neighborhood and at Johnson’s house. (RR 6: 168). She asked Moreno what was going on, and he said that Armijo “had been having [Gutierrez] since that night before.” (RR 6: 169). While in the car with Moreno, Villanueva asked if the situation was serious, and Moreno responded, “Yeah, yeah.” (RR 6: 171). Moreno drove to another gas station where he purchased cigarettes and cashed some lottery tickets. (RR 6: 171). Villanueva thought Moreno appeared nervous as they drove to Johnson’s apartment. (RR 6: 172).

When they arrived, Moreno told Villanueva to knock on the door of the “shack” where Johnson stayed. (RR 6: 172-73). Armijo said, “She’s here. She’s finally here,” and let her inside the small apartment. (RR 6: 173). Villanueva saw Gutierrez, who was lying hurt against a wall; the room “was a wreck,” and Armijo

had a baseball bat in his hand. (RR 6: 173-74). Villanueva used “cheese,” which is “heroin mixed with pills,” with Johnson, Moreno, Armijo, and David Rodriguez. (RR 6: 232-33). Then, Armijo struck Gutierrez with the bat several times. (RR 6: 175-76). Gutierrez screamed for Armijo to stop. (RR 6: 176). Armijo poured bleach on Gutierrez and repeatedly threw a pocket knife at him, stabbing him. (RR 6: 177-78). Gutierrez stopped screaming for Armijo to stop because he died. (RR 6: 179).

During the attack, Moreno went in and out of the apartment. (RR 6: 180). Villanueva did not see Armijo hit Moreno or Rodriguez. (RR 6: 181-82). Once Gutierrez died, Armijo told Moreno to look for something in which to wrap up Gutierrez’s body. (RR 6: 180). When Armijo told Rodriguez to start cleaning, Rodriguez gathered items into garbage bags and took them out of the apartment. (RR 6: 180-81). Armijo then told Moreno to stay outside, which Villanueva believed was so Moreno could “make sure nobody went back there,” as Armijo turned his attention to hurting her. (RR 6: 181). Villanueva believed Armijo intended to kill her also because he struck her repeatedly with a .45-caliber gun, causing bruising and other injuries to her head, arms, hands, and legs. (RR 6: 182, 184-85).

Moreno left, picked up his mother, and had a man named Eric drive them to his brother Alex Moreno’s house. (RR 8: 97-104). Moreno appeared frightened, and his mother prompted him to tell Eric about the murder. (RR 8: 98-99). When Alex asked what the police did, Moreno admitted the body was still at the location and

that the police had not been called. (RR 8: 99). Alex said, “We need to call the police.” (RR 8: 99). He called 911. (RR 8: 100-03). He gave the phone to Moreno during the call to answer the dispatcher’s questions. (RR 8: 103). Alex told the dispatcher that Moreno had been held at gunpoint, and Moreno provided details about the location of the crime and the suspect’s name. (RR 8: 104).

Police officers arrived at Alex’s house and asked Moreno to accompany them to the offense location. (RR 8: 105). When officers from the Dallas Police Department arrived at the offense location, they initially did not see anything, but then they heard noise coming from a finished, garage-type structure. (RR 6: 30-31). They learned that a suspect with multiple weapons was inside the structure. (RR 6: 31). The officers surrounded the structure and took cover. (RR 6: 32). Armijo exited the structure and fled. (RR 6: 33). While multiple officers chased Armijo, an officer who remained at the scene entered the structure. (RR 6: 33). He found Villanueva, who was “hysterical,” “physically shaking,” covered in blood, and injured, and took her outside where medical professionals from Dallas Fire-Rescue administered care to her. (RR 6: 33-34). She went to the hospital for medical treatment. (RR 6: 253). Meanwhile, Officer Kristen Greene and others pursued and arrested Armijo, who appeared to be under the influence of drugs. (RR 6: 54-59, 76-77). Officer Greene and her partner then returned to the garage apartment and found a body inside the structure. (RR 6: 68-69).

Officers secured the scene and called the medical examiner's office, the homicide division, and the crime scene division. (RR 6: 70). Photographs from the scene depicted apparent blood on a computer tower, the floor, and the wall as well as the condition of Gutierrez's body; he had injuries on his arms and his head, and his hands were bound. (RR 6: 89-92). An analyst photographed and collected swabs for possible DNA evidence from a bottle of bleach. (RR 6: 93, 132). The analyst found an assault rifle inside the structure near Gutierrez's body, and he also collected two handguns, gun magazines, a baseball bat, and a folding knife inside the structure as well as articles of clothing from outside the structure. (RR 6: 100-04). Moreno was photographed in an interview room at police headquarters. (RR 7: 33-36).

Homicide Detective Pedro Trujillano interviewed Moreno on July 1, 2016. (RR 7: 39-41). Moreno did not make any statements about any injuries or any pain. (RR 7: 43). Detective Trujillano observed stains on Moreno's shirt that he thought might have been blood, but he did not see any cuts on Moreno's body. (RR 7: 43). During the interview, Moreno said he said he was friends with Gutierrez and briefly became emotional. (RR 7: 47). He said Gutierrez was at Johnson's apartment when he arrived and Armijo arrived fifteen to twenty minutes later. (RR 7: 49). Moreno told the detective that Armijo pulled out a gun, "whacked" Gutierrez, and then continued hitting and taunting him. (RR 7: 49-50). Moreno said he left, and when he returned, the situation was much worse; Armijo pointed a rifle at him, which made

him scared that Armijo was going to shoot him. (RR 7: 50-51). He left, went to his house two blocks away to get his mother, and went to his brother's house where he called the police. (RR 7: 51-52). Moreno identified Armijo in a photo lineup. (RR 7: 60). Moreno also inquired about his "buddy, Mr. Yeric," another homicide detective with the Dallas Police Department. (RR 7: 51). He explained that he became acquainted with Detective Yeric when his father was killed in 2012. (RR 7: 52). At the conclusion of the interview, Moreno, who officers believed only to be a witness to the offense, freely left police headquarters. (RR 7: 47).

Detective Casey Shelton was the lead detective on the case. (RR 7: 67). He responded to the crime scene, talked to the patrol officers there, and went to the hospital to speak to Villanueva while his partner interviewed Moreno. (RR 7: 67-71). Villanueva provided an account of the actions of Armijo, Rodriguez, and Moreno. (RR 7: 72). Detective Shelton interviewed Johnson and Rodriguez. (RR 7: 75). He also obtained Armijo's cellphone records. (RR 7: 83-92). The records showed texts between Armijo and a phone number officers believed to be associated with Villanueva, including a message in which Armijo referenced Gutierrez, saying, "I fucked HM up. The homies holding for me," which led Detective Shelton to believe Armijo's friends detained Gutierrez. (RR 7: 86-90). Armijo also had recorded a video, which showed Moreno in the background. (RR 7: 92-93). In the video, Moreno entered the room while Armijo and Gutierrez were present, walked

around the bed, and placed a bottle of bleach and a bag of towels on the bed. (RR 7: 97, 101-02). Moreno does not appear to be afraid in the video. (RR 7: 102).

The investigation showed Moreno was present during the majority of the offense against Gutierrez; he left to pick up Villanueva; he was present while Armijo beat and tortured Gutierrez; he assisted in cleaning the crime scene by purchasing bleach and towels, and he assisted in restraining and abducting Gutierrez. (RR 7: 74). Detective Shelton interviewed Moreno at his home on July 6, 2016, and during this second interview, Moreno's statement differed from his first interview. (RR 7: 92-95). This time, Moreno admitted picking up Villanueva, he admitted holding Gutierrez's legs while Armijo taped his hands together, he admitted buying bleach and towels, and he admitted cleaning the crime scene. (RR 7: 95). Detective Shelton did not place Moreno under arrest on July 6, 2016. (RR 7: Detective Shelton interviewed Villanueva again after Moreno's second interview. (RR 7: 103).

Ultimately, Detective Shelton obtained arrest warrants for Armijo, Moreno, Rodriguez, and Johnson. (RR 7: 105-06). He concluded Moreno assisted Armijo in the aggravated kidnapping of Gutierrez "[b]ased on – on his statements that he assisted in the restraining, the abduction of – of Mr. Jonathan Gutierrez by holding him down while his hands were bound, preventing him from – from fleeing." (RR 7: 106-07). In his opinion, Moreno did not act under duress. (RR 7: 107). He explained that because Moreno left the offense location multiple times, he did not

appear to be under immediate threat of bodily harm or death. (RR 7: 114). Once the arrest warrant was issued, Moreno turned himself in to the police. (RR 7: 117).

At trial, Moreno presented defensive evidence. First, he presented the testimony of Dallas Police Sergeant Duane Westerlund, who spoke to Moreno at his brother Alex's house on July 1, 2016, regarding his 911 call about witnessing a murder at a different location. (RR 8: 81). Moreno told Sergeant Westerlund that he knew the victim and the offender, and he identified them by name. (RR 8: 82-83). Moreno was visibly shaken up, emotional, and frightened when he spoke to Sergeant Westerlund. (RR 8: 83-84). He told the officer he had been threatened and that Armijo pointed a gun at him. (RR 8: 84). On cross-examination, Sergeant Westerlund testified that Moreno said the beating and murder lasted "an extended period of time," but Moreno did not tell him that he left to buy cleaning supplies, that he held the victim's feet while his hands were bound, or that the purpose of the aggravated kidnapping was to lure Villanueva to the address. (RR 8: 88-89).

Moreno's brother, Alex, also testified. (RR 8: 93-116). He said he grew up on Ezekiel Avenue; Moreno continued to live there with his mother, but Alex lived with his wife and children "a five-minute drive" away from the family home. (RR 8: 95-96). He arrived home from work shortly after 4:00 p.m. on July 1, 2016, watched the news, and took a shower; he was surprised to see Moreno and their mother at his house when he finished his shower. (RR 8: 97). Moreno appeared frightened, and

his mother prompted him to tell Alex about the murder. (RR 8: 98-99). When Alex asked what the police did, Moreno said the body was still at the location and the police had not been called. (RR 8: 99). Alex called 911. (RR 8: 100-03). On cross-examination, Alex acknowledged that Moreno did not tell him or the 911 operator that someone else was in danger at the offense location. (RR 8: 109-10).

During a hearing outside the presence of the jury, Moreno requested a jury instruction on the issue of duress, which the trial court granted based on the evidence. (RR 8: 7-8). He also sought to introduce the testimony of three witnesses, Detective Michael Yeric, Dr. Michael Pittman, and Dr. Lisa Clayton, regarding his father's 2012 murder during a violent home invasion and his subsequent diagnosis of post-traumatic stress disorder (PTSD). The State objected to the evidence on grounds of relevance, hearsay, and rule 403 of the Texas Rules of Evidence. (RR 7: 159, 162).

Dr. Pittman's proffered testimony showed that he examined Moreno to determine his competency to stand trial. (RR 7: 119). He found him competent but also concluded that Moreno suffered from "a potentially severe mental illness," which was "most probably post-traumatic stress disorder." (RR 7: 120-21). Dr. Pittman also found Moreno's intelligence to be "between borderline intellectual functioning and low average." (RR 7: 121-22).

Dr. Clayton testified that she reviewed Moreno's school records and background materials from the case before she evaluated him. (RR 7: 138-40). She

concluded that Moreno suffered from PTSD. (RR 7: 141). With regard to the offense, she said Moreno's PTSD "affected his – his perception of the – the dangerousness that Mr. Armijo threatened to him, and then also to his family, specifically his mother." (RR 7: 142). She said Moreno had "a learned helplessness" and "felt kind of terrorized and in shock" when he felt Armijo was threatening his life. (RR 7: 142). She said the traumatic event in Moreno's situation was the home invasion when he was assaulted, his mother was assaulted, his niece was assaulted, and his father was murdered. (RR 7: 148-49). Finally, Moreno made a bill of exception of Detective Yeric's testimony regarding the details of the 2012 home invasion. (RR 9: 63-76).

The trial court excluded Dr. Pittman's testimony from both phases of trial, excluded Dr. Clayton's testimony during guilt-innocence "as not relevant in this part of the trial," and excluded Detective Yeric's testimony during guilt-innocence. (RR 8: 7-12, 74). The trial court concluded evidence that Appellant had PTSD stemming from his father's murder was not admissible during guilt-innocence. (RR 8: 9-12).

After hearing the evidence, the jury charge, and the parties' closing arguments, the jury found Moreno guilty of aggravated kidnapping. During the punishment phase of trial, Moreno pled not true to an enhancement paragraph alleging a prior felony conviction for aggravated assault. (RR 9: 7-8). The State presented the following punishment evidence: testimony from the medical examiner who performed the autopsy on Gutierrez's body; testimony from Dallas Police

Officer John Puente, who transported Moreno to jail after he turned himself in on the warrant for his arrest, who testified that Moreno spoke of his gang affiliation, claiming he was a member of the Tango Blast prison gang; additional testimony from Detective Shelton; the victim's father's testimony about the effect of Gutierrez's death on the family; and evidence of Moreno's prior convictions for aggravated assault with a deadly weapon, unlawful possession of heroin, unlawful possession of cocaine, and evading arrest using a vehicle. (RR 9: 46-110).

Moreno presented extensive evidence regarding his father's murder in 2012 and the murder's effect on him. Specifically, Dr. Lisa Clayton, "a medical doctor specializing in the field of psychiatry with a subspecialty in forensic psychiatry," testified for the defense. (RR 9: 10-45). Dr. Clayton testified about her evaluation of Moreno and her conclusions. (RR 9: 10-13). She said that based on her evaluation of Moreno and the information she reviewed, she concluded that Moreno suffered from PTSD, stemming from the 2012 home invasion during which his father was murdered. (RR 9: 17-18). Dr. Clayton explained that in the time since his father died in his arms, Moreno had exhibited symptoms of PTSD, had a variety of intrusive thoughts and nightmares, often cried, increased his drug usage, and was unable to sleep. (RR 9: 22). She opined that because he had PTSD, Moreno would see himself as a victim and be more fearful in a situation involving guns and violence. (RR 9: 24). He had an "over-exaggerated sense of worry" about something happening to his

mother. (RR 9: 25). Dr. Clayton said Moreno's condition "made him more fearful and less – I guess less – that he didn't act appropriately in that situation" on July 1, 2016. (RR 9: 25). Moreno believed Armijo's threats to kill Moreno's family, "and that caused him to not go get help sooner." (RR 9: 25-26).

Dr. Clayton testified that she did not observe any indication of malingering, or "faking or exaggerating symptoms for secondary gain," during her evaluation of Moreno. (RR 9: 23-24). On cross-examination, Dr. Clayton acknowledged that she did not prepare a report of her findings, explaining she was not asked to prepare a report. (RR 9: 26-29). She also explained that she did not perform any standardized testing in her evaluation of Moreno, saying the practice did not really exist in forensic psychiatry. (RR 9: 31).

Detective Michael Yeric testified that he served as the lead detective in the 2012 murder of Moreno's father, Lorenzo Moreno. (RR 9: 116-17). He explained:

In that case, there was a man in his 60s that was killed inside of his home during a home invasion robbery. There was a group of young people – in some cases were very young – between the ages of 13 and 17 that did a home invasion on the house. There was a girl involved in the home invasion that had an issue with the girl that lived at the house. That was the – the reason for the – the home invasion.

They go in the house. During the incident, there's – there's a lot of, you know, confrontation and fighting and whatnot, during which the – the man – the 66-year-old man – was shot in the chest with a shotgun and killed.

The 16-year-old girl in the back was – attempted to be stabbed, but the knife was dull enough that it didn't actually really get in the bed sheets and the comforter. It poked her, but no serious wounds.

The man that was killed, his wife was – was beaten inside the house and his son was beaten on the front porch.

(RR 9: 117-18).

Detective Yeric identified Moreno as the son who was beaten on the porch. (RR 9: 118). He believed the members of the Moreno family were innocent victims. (RR 9: 119). Five people were charged in the offense. (RR 9: 120). Moreno offered and the trial court admitted photographs of the crime scene, which depicted damage in the home, blood present where Lorenzo was shot, and blood spatter on a Ford pickup in the driveway of the home, as well as photographs of Moreno's facial injuries. (RR 9: 166-66). On cross-examination, Detective Yeric testified that he did not think being a crime victim excused later criminal conduct. (RR 9: 169).

Olivia Hernandez, Moreno's niece, testified that prior to his arrest in this case, Moreno cared for his mother, who suffered from health problems. (RR 9: 136-37). She testified about the 2012 home invasion. (RR 9: 138). She never saw Moreno be violent toward anyone; she described him as a loving family member. (RR 9: 142-43). On cross-examination, she said she was unaware Moreno had prior felony convictions but had visited him in prison with her grandparents. (RR 9: 147-51). She never heard Moreno claim membership in Tango Blast. (RR 9: 152). She said Moreno's drug addiction became worse after 2012. (RR 9: 156).

After the parties rested and closed, the trial court read the punishment charge to the jury, and the parties presented closing arguments. (RR 9: 172-99). The jury found the enhancement paragraph to be true and returned a punishment verdict of forty-five years' confinement and a \$10,000 fine. (RR 10: 4).

SUMMARY OF THE ARGUMENT

In this case, Moreno sought to introduce evidence of his personal experiences and his mental health diagnosis as evidence pertaining to his claim of duress. After hearing the proffered evidence and arguments, the trial court concluded that the evidence was not relevant during the guilt-innocence phase of trial; the court of appeals reversed, however, finding an abuse of discretion in the exclusion of the evidence and designating the opinion for publication. The court of appeals erred in two significant ways: first, the court of appeals supplanted this Court's function of determining the character of evidence that is relevant to a claim of duress where this Court previously opined on the matter; second, the court of appeals failed to properly apply an abuse-of-discretion standard to the trial court's evidentiary ruling when the trial court's decision did not fall outside the zone of reasonable disagreement.

ARGUMENT

Ground for Review, Restated: The court of appeals erred in finding that the trial court abused its discretion by excluding evidence of the defendant's particular circumstances as irrelevant to the objective reasonable person standard for duress.

Properly applying an abuse-of-discretion standard of review to the facts in this case demonstrates that the trial court acted within its discretion in excluding evidence of Moreno's personal experiences and mental health diagnosis during the guilt-innocence phase of trial. By concluding otherwise, the court of appeals impermissibly substituted its judgment for that of the trial court.

A. Standard of Review: Abuse of Discretion

A court of appeals reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g). The reviewing court should not reverse the trial court's ruling unless it falls outside the zone of reasonable disagreement. *Resendiz v. State*, 112 S.W.3d 541, 544 (Tex. Crim. App. 2003); *Montgomery*, 810 S.W.2d at 391. A trial court abuses its discretion only when the court's decision was so clearly wrong as to lie outside the zone within which reasonable persons might disagree. *Henley v. State*, 493 S.W.3d 77, 83 (Tex. Crim. App. 2016) (quoting *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008)).

In determining whether the trial court abused its discretion in making an evidentiary decision, a reviewing court cannot substitute its judgment for that of the

trial court because the trial court is in a superior position to evaluate the impact of the evidence. *Montgomery*, 810 S.W.2d at 379. If the record supports the trial court's decision on the admission or exclusion of evidence, there is no abuse of discretion and the trial court's decision should be upheld. *Osborn v. State*, 92 S.W.3d 531, 537-38 (Tex. Crim. App. 2002). Additionally, if the trial court's ruling was correct on any theory of law applicable to the case, the judgment of the trial court should be upheld. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

B. Applicable Law: Duress

Section 8.05 of the Penal Code provides, "It is an affirmative defense to prosecution that the actor engaged in the proscribed conduct because he was compelled to do so by threat of imminent death or serious bodily injury to himself or another." Tex. Penal Code Ann. § 8.05(a). The statute specifically provides that "compulsion within the meaning of this section exists only if the force or threat of force would render a person of reasonable firmness incapable of resisting the pressure." *Id.* § 8.05(c). Thus, the question is whether "a person of reasonable firmness" could resist the compulsion; the question is not whether a particular defendant could do so. *See id.* Whether a "person of reasonable firmness" would be incapable of resisting the pressure to engage in proscribed conduct is an objective inquiry rather than a subjective one. *See Ramirez v. State*, 336 S.W.3d 846, 850 (Tex. App.—Amarillo 2011, pet. ref'd) (citing *Wood v. State*, 18 S.W.3d 642, 651 n.8

(Tex. Crim. App. 2000) (recognizing that section 8.05 establishes an objective test in rejecting the defendant's claim that the statute denied him "equal protection of the laws" because he "is not and never will be a 'person of reasonable firmness'")).

Additionally, in an unpublished opinion, this Honorable Court has explained that the relevant inquiry is an objective inquiry rather than a subjective one. *Cobb v. State*, No. AP-74,875, 2007 WL 274206, at *2-3 (Tex. Crim. App. Jan. 31, 2007) (not designated for publication). In *Cobb*, this Court rejected the defendant's claim that the trial court erred by excluding guilt-innocence phase testimony from defense experts. *Id.* at *2. There, the defendant claimed the expert testimony was relevant to his claim of duress because it would have shown that he was "'more suggestible' to outside forces and less able 'to consider other options' than an 'average person' because he was neglected by his chemically dependent mother as a child and suffered from depression and chemical dependency as an adult," and that he "had cognitive weaknesses that were consistent with fetal-alcohol syndrome; thus, he was more susceptible to compulsion and less likely to consider other alternatives than an average person." *Id.* at *3.

This Court concluded that the trial court did not abuse its discretion in excluding the testimony. *Id.* Specifically, this Court explained:

The inquiry is whether a "person of reasonable firmness" would be incapable of resisting the pressure to engage in the proscribed conduct, not whether this particular defendant could have resisted in light of cognitive weaknesses, depression, chemical dependency, and the

neglect he suffered as a child. It is an objective inquiry rather than a subjective one. *See United States v. Willis*, 38 F.3d 170, 176 (5th Cir. 1994); *Wood v. State*, 18 S.W.3d 642, 651 n. 8 (Tex. Crim. App. 2000); *Kessler v. State*, 850 S.W.2d 217, 222 (Tex. App.—Fort Worth 1993, no pet.).

Id. In reaching this conclusion, this Court gave appropriate deference to the trial court's discretion in evidentiary matters.

Furthermore, as this Court explained in *Henley v. State*, “A defendant’s right to present evidence relevant to a valid justification defense should not be confused with a defendant’s right to present his case-in-chief.” 493 S.W.3d at 83. Thus, while a defendant has the right to put on a case-in-chief, that right is not without limitations. *Id.* A defendant does not have an unfettered right to present evidence that has no relevance; likewise, the trial court has the authority to exclude relevant evidence under rule 403 if the probative value of the evidence is “substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.” *Id.* at 83, 93 (quoting Tex. R. Evid. 403).

C. Analysis: The trial court did not abuse its discretion in excluding the evidence.

Here, the trial court granted Moreno’s request for a jury instruction on the affirmative defense of duress. (RR 8: 7-8). Moreno also sought to introduce the testimony of Detective Michael Yeric, Dr. Michael Pittman, and Dr. Lisa Clayton regarding his father’s 2012 murder and his subsequent PTSD diagnosis. As noted

above, the State objected to the relevance of the evidence and objected under rule 403 of the Texas Rules of Evidence as well as hearsay. (RR 7: 159, 162). After hearing the proffered testimony, the trial court excluded Moreno's proffered guilt-innocence phase testimony regarding his father's murder and his subsequent PTSD diagnosis. (RR 8: 7-13). The trial court explained that it did not believe PTSD was "relevant as far as the guilt-innocence phase for his state of mind." (RR 8: 13).

Relevance

The court of appeals held that the trial court erred in excluding guilt-innocence phase testimony regarding Moreno's particular circumstances. *Moreno*, 2019 WL 4071993, at *16. In reaching this conclusion, the court rejected the State's arguments that the requirements for establishing duress do not account for an appellant's subjective susceptibility and that the trial court could have excluded the proffered testimony as overly confusing or misleading to the jury. *Id.* The court of appeals acknowledged this Court's decision in *Cobb*, but looked instead to a line of decisions from federal courts and courts from other states regarding the admissibility of evidence regarding a defendant's "particular circumstances" as relevant to the affirmative defense of duress in the context of battered woman's syndrome because *Cobb* lacked precedential value and because the court concluded that the case relied on by this Court in deciding *Cobb* was readily distinguishable. *Id.* at *14-15; *see* Tex. R. App. P. 77.3.

The court of appeals erred in two significant ways: first, the court of appeals supplanted this Court's function of determining the character of evidence that is relevant to a claim of duress where this Court previously opined on the matter; second, the court of appeals failed to properly apply an abuse-of-discretion standard to the trial court's evidentiary ruling when the trial court's decision did not fall outside the zone of reasonable disagreement.

Importantly, as a matter of Texas law, the evidence offered by Moreno was not and could not be relevant to the affirmative defense of duress. Section 8.05(a) requires a showing that the defendant was factually compelled to engage in the proscribed conduct, and section 8.05(c) explains that such compulsion exists only if the force or threat of force would render a person of reasonable firmness incapable of resisting the pressure. *See* Tex. Penal Code Ann. § 8.05(a), (c). Moreno's proffered evidence, at most, showed that he would be more susceptible to pressure or compulsion than persons of ordinary moral strength and fortitude. This is similar to the nature of the evidence offered and found irrelevant in *Willis* in the context of evidence of battered woman's syndrome:

Such evidence is not addressed to whether a person of reasonable firmness would have succumbed to the level of coercion present in a given set of circumstances. Quite the contrary, such evidence is usually consulted to explain why this particular defendant succumbed when a reasonable person without a background of being battered might not have. Specifically, battered woman's syndrome evidence seeks to establish that, because of her psychological condition, the defendant is unusually susceptible to the coercion.

Willis, 38 F.3d at 175. Thus, the court in that case found the evidence not relevant to a claim of duress. Moreno's proffered evidence was similarly irrelevant because the evidence would not have showed that a person of reasonable firmness could not resist the coercion but rather that, because of his psychological condition and his personal history, Moreno was unusually susceptible to coercion.

Furthermore, while unpublished, this Court's opinion in *Cobb* provides a useful framework for analyzing the character of evidence that is relevant to a claim of duress under Texas law. Indeed, this Court's deference to the trial court and ultimate conclusion in *Cobb* is instructive and appropriate in this case as well. Here, the trial court heard the proffered evidence, considered the parties' arguments regarding the admissibility of the evidence, and determined that the evidence was not relevant during the guilt-innocence phase of trial. In reaching this decision, the trial court did not reach a conclusion contrary to existing Texas law nor did the decision fall outside the zone of reasonable disagreement.

Stated differently, the trial court's decision to exclude Moreno's proffered evidence as irrelevant to the objective reasonable person standard was not so clearly wrong as to lie outside the zone within which reasonable people might agree. *See Henley*, 493 S.W.3d at 83. Indeed, the trial court's determination neither conflicted with the established precedent of this Court nor misconstrued the express language of the applicable statute. As such, the trial court's decision cannot be viewed as an

abuse of discretion. The court of appeals erred in substituting its judgment for that of the trial court and by determining that evidence of Moreno's particular circumstances was relevant to the issue of duress.

Furthermore, although the court of appeals relied upon a trend in federal courts and courts in other states in allowing evidence of battered woman's syndrome in the context of the defense of duress, the trend is not universal. Indeed, some courts have considered evidence of PTSD—the specific diagnosis at issue here—and found the evidence irrelevant to the issue of duress. The United States Court of Appeals for the Fifth Circuit has concluded that evidence of both battered woman's syndrome and PTSD is “inherently subjective and therefore inadmissible as irrelevant to the defense of duress.” *United States v. Morazan-Alvarez*, 535 Fed. App'x 363, 368-69 (5th Cir. 2013) (citing *Willis*, 38 F.3d at 175); *see, e.g., United States v. Dixon*, 901 F.3d 1170, 1181-84 (10th Cir. 2018); *Arizona v. Jacobson*, 418 P.3d 960, 963-65 (Ariz. App. 2018). Importantly, in *Dixon*, the United States Court of Appeals for the Tenth Circuit thoroughly explained and distinguished some of the very cases cited by the court of appeals below, noting an important difference in the “linguistic formulation” of the Model Penal Code provision on duress, which refers to a “person of reasonable firmness *in his situation*,” and the language of a provision more akin to section 8.05(a) of the Texas Penal Code, which makes no such reference to the actor's situation. *Dixon*, 901 F.3d at 1181-84 (emphasis added).

Rule 403

Finally, the proffered evidence was also inadmissible under rule 403. Even though the trial court explained that it found the evidence not relevant during the guilt-innocence phase of trial, this Court has explained that the reviewing court should uphold the trial court's evidentiary ruling if it was correct on any theory of law applicable to the case. *See Henley*, 493 S.W.3d at 93; *De La Paz*, 279 S.W.3d at 344. Thus, assuming Moreno's proffered evidence had been relevant, the trial court had the authority to exclude the evidence under rule 403. In determining whether a court properly excludes evidence under rule 403, an appellate court balances the claimed probative force of the proffered evidence along with the proponent's asserted need for that evidence against (1) any tendency of the evidence to suggest that the case would be decided on an improper basis; (2) any tendency of the evidence to confuse or distract the jury from the main issues; (3) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence; and (4) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *Henley*, 493 S.W.3d at 93; *Gigliobianco v. State*, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006).

An analysis of these factors supports exclusion of the evidence. For evidence to be probative, it “must tend to make the existence of [a fact of consequence to the

determination of the action] ‘more or less probable than it would be without the evidence.’” *Henley*, 493 S.W.3d at 83; *Miller v. State*, 36 S.W.3d 503, 507 (Tex. Crim. App. 2001). Moreno wanted the evidence of his father’s murder and his subsequent diagnosis of PTSD before the jury to support his claim that he acted under duress. The evidence was not relevant or probative to the objective reasonable person standard for duress, but even if the court found the evidence to have probative value, the remaining factors of the analysis weigh strongly against admission of the evidence.

The presentation of the evidence would have consumed an inordinate amount of time and would have served to confuse and distract the jury from the main issue—specifically, Moreno’s role in the aggravated kidnapping of Gutierrez—and would have allowed them to give undue weight to this evidence. In this case, the trial court could have concluded that the evidence Moreno sought to offer regarding his particular circumstances would have confused the jury in their ability to properly apply section 8.05(c). Thus, the trial court would not have abused its discretion in excluding the evidence under rule 403. The role of the court of appeals was to determine whether the trial court’s decision was correct under any theory of the law applicable to the case. *See Henley*, 493 S.W.3d at 93; *De La Paz*, 279 S.W.3d at 344. The trial court’s decision could have been upheld under rule 403.

Conclusion

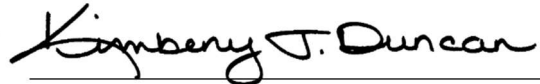
The court of appeals reached a different conclusion upon consideration of Moreno's proffered evidence than the trial court. In doing so, the court failed to abide by this Court's long-standing principle that a trial court's ruling on the admissibility of evidence should not be reversed unless the decision falls outside the zone of reasonable disagreement. Further, the admissibility of evidence of PTSD and similar diagnoses on a defendant's particular circumstances is a matter of disagreement between courts nationwide. This Honorable Court should reverse the decision of the court of appeals, reinstate Moreno's conviction, and clarify that a defendant's particular circumstances are not relevant to the objective reasonable person standard for the defense of duress under section 8.05 of the Texas Penal Code.

PRAYER

The State respectfully prays that this Court reverse the decision of the court of appeals and reinstate Moreno's conviction.

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Respectfully submitted,



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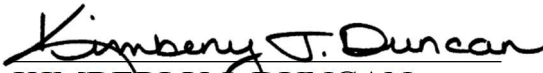
CERTIFICATE OF COMPLIANCE

I hereby certify that of the foregoing brief, inclusive of all contents, is 7,293 words in length, according to Microsoft Word, which was used to prepare the brief, and that the foregoing brief complies with the word-count limit and typeface conventions required by the Texas Rules of Appellate Procedure.


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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing brief has been served on the Honorable Christi Dean, Counsel for Respondent Ricky Moreno, and on the State Prosecuting Attorney, via electronic service on December 18, 2019.


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